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RANDHIR SINGH BHAJNIK SINGH v. SUNILDAVE SINGH PARMAR (THE ADMINISTRATOR OF THE ESTATE OF K SURJIT KAUR GEAN KARTAR SINGH (DECEASED))

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COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-2587-12-2017]
25 SEPTEMBER 2018

C

DEBTORS: *Recovery of monies – Personal loan – Claim for repayment of loan – Statutory declaration of indebtedness – Administrator of deceased initiated legal proceeding against borrower by claiming certain amount as per statutory declaration – Usage of statutory declaration as document to recover loan – Whether contrary*
D *to Stamp Act 1949 – Whether ad valorem duty paid – Whether statutory declaration to seek repayment of loan in breach of general purpose of statutory declaration*

EVIDENCE: *Admission – Statutory declaration of indebtedness – Judgment entered against borrower principally on statutory declaration of indebtedness – Whether s. 17 of Evidence Act 1950 conclusive proof provision – Evidence Act 1950,*
E *ss. 17, 31 & 102*

The appellant had received a personal loan from the deceased, who was conducting a money-lending business wherein the deceased had charged interest amounting to 4% on the said loan. The appellant had settled the full capital payment to the deceased and also had paid half of the said interest
F charged by the deceased on the said loan. However, there were accrued interests of the said loan and, as such, the appellant had affirmed a statutory declaration. According to the appellant, he had affirmed the said statutory declaration upon the pressure and coercion by the deceased. Upon affirming the statutory declaration, the appellant did not make any payment to the
G deceased. The respondent, as the administrator of the deceased's estate, initiated a legal proceeding against the appellant by claiming for RM2,000,000 as per the statutory declaration. The appellant denied the claim. The High Court entered judgment for the respondent principally on a statutory declaration of indebtedness of a debt for the sum of RM2 million.
H Aggrieved by the said decision, the appellant appealed.

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Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The trial judge had acted on the basis of principles of admission (under s. 17 of the Evidence Act 1950 (EA 1950) only), ignoring other parts of the Act such as s. 31 as well as s. 102, *etc*. There was no mention of these sections in the judgment as well, thereby warranting appellate intervention to set aside the judgment *in limine.* (para 4)

(2) It is trite that legal burden was on the respondent and the evidential burden and/or opposing evidence to rebut the claim on the balance of probabilities lay on the appellant. When the respondent merely relied on s. 17 of the EA 1950, the court must take cognisance that s. 17 was not a conclusive proof provision as stated in s. 31 of the Act. In the present case, the deceased had died and in consequence, the appellant's version had not been rebutted in any material form. The respondent would be in no position to credibly provide sufficient evidence to neutralise the appellant's story. Thus, purely relying on s. 17 may not meet the challenge related to conclusive evidence provision. (para 8)

(3) The terms for the return of money stated in the statutory declaration was quite unusual. The debt mentioned related to past consideration. The terms of the payment was also unusual. In addition, statutory declarations were not generally used as a document to recover a loan granted as it would impinge on the Stamp Act 1949. When a loan is granted and parties want it to be documented, it required an *ad valorem* duty to be paid. In the instant case, there was no evidence of payment *ad valorem*. (para 8)

(4) The statutory declaration to seek repayment of a loan was in breach of the general purpose for what statutory declaration was meant for. If *ad valorem* duty was not paid, the statutory declaration as admission of loan may not be worth the paper it was written on. The appellant's defence was one sustainable in law. The failure of the trial judge to give proper weight to the defence version in actual fact compromised the integrity of the decision-making process. (para 11)

Bahasa Malaysia *Headnotes*

Perayu menerima pinjaman peribadi daripada si mati, yang menjalankan perniagaan meminjamkan duit di mana faedah yang dicaj oleh si mati berjumlah 4% atas pinjaman tersebut. Perayu telah menyelesaikan bayaran modal penuh kepada si mati dan juga telah membayar setengah daripada faedah yang dicajkan oleh si mati atas pinjaman tersebut. Walau bagaimanapun, terdapat faedah terakru pinjaman tersebut dan perayu telah mengikrarkan satu akuan berkanun. Menurut perayu, dia telah mengikrarkan

akuan berkanun itu atas tekanan dan paksaan si mati. Apabila akuan berkanun itu diikrarkan oleh perayu, perayu tidak membuat apa-apa bayaran kepada si mati. Responden sebagai pentadbir estet si mati memulakan prosiding undang-undang terhadap perayu dengan tuntutan RM2,000,000 menurut akuan berkanun. Perayu menafikan tuntutan. Mahkamah Tinggi memasukkan penghakiman untuk responden terutamanya atas akuan berkanun keterhutangan hutang berjumlah RM2 juta. Terkilan dengan keputusan tersebut, perayu merayu.

Diputuskan (membenarkan rayuan)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara telah bertindak atas dasar prinsip-prinsip kemasukan (bawah s. 17 Akta Keterangan 1950 (AK 1950) sahaja), tidak mempedulikan bahagian-bahagian lain Akta seperti s. 31 serta s. 102 dan lain-lain. Seksyen-seksyen ini tidak disebut dalam penghakiman juga, oleh itu mewajarkan campur tangan rayuan untuk mengetepikan penghakiman *in limine.*

(2) Adalah matan bahawa beban undang-undang atas plaintif dan beban keterangan dan/atau menentang keterangan untuk menyangkal tuntutan plaintif atas imbangan kebarangkalian dikenakan ke atas defendan. Apabila responden hanya bergantung pada s. 17 AK 1950, mahkamah harus mengambil perhatian bahawa s. 17 bukan peruntukan bukti muktamad seperti yang dinyatakan dalam s. 31 Akta. Dalam kes ini, si mati telah meninggal dunia dan akibatnya, versi perayu tidak disangkal dalam apa-apa bentuk material. Responden di sini tidak mempunyai kedudukan untuk menyediakan keterangan memadai untuk meneutralkan versi perayu. Oleh itu, hanya merujuk pada s. 17 sahaja tidak akan menghadapi cabaran berhubungan peruntukan keterangan muktamad.

(3) Terma-terma untuk pemulangan wang yang dinyatakan dalam akuan berkanun agak luar biasa. Hutang yang disebut berhubungan balasan lampau. Syarat-syarat bayaran juga agak luar biasa. Tambahan, akuan berkanun tidak selalunya digunakan sebagai dokumen untuk mendapatkan semula pinjaman yang dibenarkan kerana ia akan melanggari Akta Setem 1949. Apabila pinjaman diberikan dan pihak-pihak inginnya didokumentasi, ia memerlukan duti *ad valorem* dibayar. Dalam kes ini, tiada keterangan menunjukkan bahawa terdapat bayaran *ad valorem*.

(4) Akuan berkanun untuk menuntut pembayaran balik pinjaman melanggar tujuan umum maksud akuan berkanun. Jika duti *ad valorem* tidak dibayar, akuan berkanun sebagai pengakuan pinjaman mungkin tidak bernilai. Pembelaan perayu adalah mampan dari segi undang-undang. Kegagalan hakim bicara memberikan beban sewajarnya kepada versi pembelaan dari segi fakta telah mengkompromikan integriti proses membuat keputusan.

Case(s) referred to:

Kenanga Investment Bank Bhd v. Swee Joo Bhd & Ors And Another Appeal [2017] 1 LNS 2086 CA ***(refd)***

Ong Koh Hou v. DA Land Sdn Bhd & Ors [2019] 4 CLJ 622 CA ***(refd)***

Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor And Other Appeals [2018] 4 CLJ 323 CA ***(refd)***

Reebok (M) Sdn Bhd v. CIMB Bank Bhd [2018] 1 LNS 1186 CA ***(refd)***

Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***

Wong Kian Wah v. Ng Kien Boon [2018] 1 LNS 1013 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 17, 31, 57, 102

For the appellant - PM Nagarajan Periasamy & Vinoshni Narayanasamy; M/s Nagarajan Peri & Co

For the respondent - K Thavanesan & D Ramesh; M/s K Thava

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-22NCVC-124-03-2017 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/defendant appeals against the decision of the High Court which entered judgment for the respondent/plaintiff (administrator of the deceased's estate of K. Surjit Kaur a/p Gean Kartar Singh) principally on a statutory declaration of indebtedness of debt for the sum of RM2 million.

[2] In the instant case, learned counsel for the respondent had relied on the case of *Wong Kian Wah v. Ng Kien Boon* [2018] 1 LNS 1013; [2018] MLJU 989; [2018] AMEJ 0827, the coram consisting of Hamid Sultan bin Abu Backer JCA, Abdul Rahman bin Sebli JCA and Mary Lim Thiam Suan JCA. The facts of *Wong Kian Wah*'s case is different. In *Wong Kian Wah*'s case, the admission was in the agreed facts. There was no challenge to that admission. In the instant case, the statutory declaration and its purpose had been a point of contention in the entire trial.

[3] The said statutory declaration and its terms as well as the amount will on the face of record, to any reasonable tribunal, appear that there must be a great story behind the whole transaction. The appellant in rejecting the claim had explained in his evidence in a cogent manner.

[4] The learned trial judge had acted on the basis of principles of admission (under s. 17 of the Evidence Act 1950 (EA 1950) only), ignoring other parts of the Act such as s. 31 as well as s. 102, etc. There was no mention of these sections in the judgment as well, thereby warranting appellate intervention to set aside the judgment *in limine*.

[5] The said statutory declaration read as follows:

> I Randhir Singh a/l Bhajnik Singh NRIC No 710628-10-6545 address No. 12, Jalan Camar 4/25, Villa Damansara, 47810, Kota Damansara, Petaling Jaya, Selangor Darul Ehsan would like to declare that I have been receiving friendly loans free from any interest whatsoever from K.Surjit Kaur a/p Gean Kartar Singh NRIC No. 591229-10-5426 address 302 Summervilla Condominium, Wangsa Baiduri, 11 Jalan SS12/1, 47500 Subang Jaya, Selangor Darul Ehsan.
>
> The total amount of loans received till to date is Ringgit Malaysia Two Million Only (RM2,000,000.00).
>
> I undertake to return the said amounts of money taken from K.Surjit Kaur within 24 months from receiving any formal notice of demand from K.Surjit Kaur or ten years (10 years) from this date whichever is earlier.

[6] The defendant's version to the plaintiff's claim has been well articulated by the learned counsel for the appellant and to save court's time, we repeat *verbatim*. It *inter alia* reads as follows:

> **Brief Facts**
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> 1. The Appellant/Defendant is a director and shareholder of the Company by the name of Tiger Force Sdn Bhd.
> 2. The Appellant/Defendant have received a personal loan amounting to RM672,225.00 from K.Surjit Kaur a/p Gean Kartar Singh (the deceased), who was the Appellant's/Defendant's friend who was conducting a money lending business without a valid license wherein the deceased have charged interest amounting to 4% on the said loan.
> 3. The Appellant/Defendant has settled the full capital payment to the deceased and also have paid half of the said interest charged by the deceased on the said loan. However, there were accrued interest of the said loan and as such the Appellant/Defendant have affirmed a Statutory Declaration dated 05/01/2011.

4. The Appellant/Defendant has affirmed the said Statutory Declaration upon the pressure and coercion by the deceased, whereby the deceased has threatened the Appellant/Defendant that if the Appellant/Defendant refuses to pay the accrued interest by affirming the statutory declaration, the deceased would tarnish the Appellant's/Defendant's name for the money lending in their Sikh religion Community.

5. The said Statutory Declaration was affirmed for the accrued interest which from the said personal loan given by the deceased to the Appellant/Defendant whereby the deceased has informed the Appellant/Defendant that he should pay the said accrued interest in 10 years' time with a fixed amount of RM2,000,000.00 as stated in the said Statutory Declaration dated 05/01/2011.

6. Upon affirming the Statutory Declaration, the Appellant/Defendant did not make any payment to the deceased.

7. Besides the personal loan given to the Appellant/Defendant, the deceased have also given loan amounting to RM1,604,925.00 to the Appellant's/Defendant's previous company Dominasi Cendana Sdn Bhd and have also charged an interest amounting to 4% on the said loan.

8. The said borrowing was paid by Dominasi Cendana Sdn Bhd *vide* cash to the deceased as requested by the deceased. Besides that the deceased have also conducted money lending business by lending the Appellant's/Defendant's current company, Tigerforce Sdn Bhd, whereby the Appellant/Defendant does not have any control over the money flow.

9. However, on 28/02/2017, the Respondent/Plaintiff as the administer of the deceased's estate has initiated a legal proceeding against the Appellant by claiming for the said RM2,000,000.00 as per the Statutory Declaration and as alternative have claimed the amount of RM1,654,925.00 from the Appellant/Defendant which clearly the Appellant/Defendant has denied to the claim.

10. The Respondent/Plaintiff has in his submitted banking slips which were issued to Dominasi Cendana Sdn Bhd and Tigerforce Sdn Bhd and have claimed the sum of RM1,654,925.00 from the Appellant/Defendant who is merely the shareholder and director of the companies. The Appellant/Defendant has denied all through his defence dated 25/05/2017.

[7] The appellant in the memorandum of appeal had taken into issue the facts and breach of law, etc. We do not think it is necessary to go into those issues inclusive of issues related to limitation. It will be sufficient on the facts of this case to consider whether as per the statutory declaration, the plaintiff

A is entitled to judgment on the face of defendant's evidence taking into consideration the fact that a sum of RM1,609,925 was paid to the appellant's previous company. The said memorandum of appeal reads as follows:

1. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta kes Perayu/Defendan bahawa
B K.Surjit Kaur a/p Gean Kartar (Simati) menjalankan satu urusniaga pinjaman wang berfaedah tanpa berlesen yang bertentangan dengan Akta Pinjaman Wang 1951 (Money Lenders Act 1951);

2. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila tidak mengambil kira bukti iaitu rakaman video
C yang bertarikh 18/01/2011 yang diberikan oleh Perayu/Defendan yang dengan jelasnya menunjukkan bahawa K. Surjit Kaur a/p Gean Kartar (Simati) menjalankan satu urusniaga pinjaman wang berfaedah tanpa lesen yang sah;

3. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal melihat transaksi pinjaman yang diberikan
D oleh Simati K. Surjit Kaur a/p Gean Kartar kepada Perayu/ Defendan merupakan satu transaksi yang menyalahi undang-undang;

4. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta kes Perayu/Defendan yang
E menyatakan bahawa Perayu/Defendan mempertikaikan kandungan Surat Akuan yang telah diikrarkan oleh Perayu/Defendan pada 05/01/2011;

5. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta kes Perayu/Defendan yang
F menyatakan bahawa pinjaman peribadi diberikan oleh Simati K.Surjit Kaur a/p Gean Kartar kepada Perayu/Defendan adalah jumlah wang RM672,225.00 yang telah dibayar balik oleh Perayu/ Defendan kepada Simati dan bukanlah wang jumlah Ringgit Malaysia Dua Juta (RM2,000,000.00);

G 6. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana Perayu/Defendan menyatakan bahawa wang jumlah Ringgit Malaysia Dua Juta (RM2,000,000.00) tersebut adalah jumlah faedah terakru yang dikenakan oleh Simati K.Surjit Kaur a/p Gean Kartar kepada Perayu/Defendan dan bukanlah satu pinjaman wang diberikan oleh
H Simati kepada Perayu/Defendan seperti dinyatakan oleh Responden/Plaintif;

7. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan isu yang dibangkitkan oleh Perayu/ Defendan bahawa tuntutan Responden/Plaintif adalah "time barred' mengikut Seksyen 6(1) Akta Had Masa 1953;
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8. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana Perayu/Defendan menyatakan bahawa tuntutan Responden/Plaintif tidak berasas dan bercanggah atas sebab terdapat tiga senario tuntutan berlainan dituntut oleh Responden/Plaintif terhadap Perayu/Defendan yang dimana menunjukkan bahawa Responden/Plaintif sendiri tidak pasti akan tuntutannya terhadap Perayu/Defendan. Perkara ini telah diakui oleh Responden/Plaintif sendiri semasa perbicaraan dan Yang Arif yang bijaksana telah terkhilaf dengan tidak mengambil perhatian terhadap isu ini;

9. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana Perayu/Defendan menyatakan bahawa Responden/Plaintif adalah seorang saksi yang tidak bermaterial dan tidak pasti akan tuntutannya terhadap Perayu/Defendan yang merupakan satu penyalahgunaan proses Mahkamah;

10. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta dimana segala transaksi pinjaman berdasarkan slip-slip deposit dinyatakan oleh Responden/Plaintif dalam tuntutannya adalah pinjaman wang diberikan oleh Simati pada tahun 2010 iaitu sebelum Akuan Berkanun bertarikh 05/01/2011 diikrarkan oleh Perayu/Defendan yang dengan jelasnya merupakan satu "past consideration".

11. Yang Arif yang bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila menghiraukan fakta Perayu/Defendan yang menyatakan bahawa tuntutan Responden/Plaintif adalah tidak berasas atas sebab Responden/Plaintif menuntut Ringgit Malaysia Dua Juta (RM2,000,000.00) dan secara alternatif Ringgit Malaysia Satu Juta Enam Ratus Lima Puluh Empat Ribu Sembilan Ratus Dua Puluh Lima (RM1,654,925.00) di mana Responden/Plaintif sendiri tidak pasti akan tuntutannya yang sebenar. Yang Arif yang bijaksana dengan jelasnya telah terkhilaf dengan tidak mengambil perhatian terhadap tuntutan yang tidak berasas ini apabila gagal meletakkan jumlah tuntutan yang sebenar Responden/Plaintif di dalam mindanya.

[8] We have read the appeal records and the able submissions of the parties. After giving much consideration to the submission of learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) It is trite that legal burden is on the plaintiff and the evidential burden and/or opposing evidence to rebut the plaintiff's claim on the balance of probabilities lies on the defendant. In *Pan Malaysian Pools Sdn Bhd v. Kwan Tat Thai & Anor And Other Appeals* [2018] 4 CLJ 323, the Court of Appeal observed:

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> [7] It is well-established as a general rule that 'burden of proof' in a civil case is on the plaintiff but the burden will shift when the plaintiff has adduced sufficient evidence of probative value which requires the defendant to rebut the plaintiff's evidence. …

(See *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] 1 MLJ 253).

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(b) In addition, when the plaintiff materially relies on s. 17 of the EA 1950, the court must take cognisance that s. 17 is not a conclusive proof provision as stated in s. 31 of the Act which reads as follows:

> Admissions not conclusive proof but may estop
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> 31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

(c) In addition, in the instant case, the deceased had died and in consequence, the defendant's version had not been rebutted in any
D material form. The plaintiff in this case will be in no position to credibly provide sufficient evidence to neutralise the defendant's story. Thus, purely relying on s. 17 may not meet the challenge related to conclusive evidence provision.

(d) Further, the terms for the return of money stated in the statutory
E declaration is quite unusual. The debt mentioned related to past consideration. The terms of payment is also unusual. In addition, statutory declarations are not generally used as a document to recover a loan granted as it will impinge on the Stamp Act 1949. When a loan is granted and parties want it to be documented, it requires an *ad valorem*
F duty to be paid. In the instant case, there was no evidence of payment *ad valorem*. The Stamp Act 1949 says:

> 22 BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:
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> | | | |
> |---|---|---|
> | (1) | (a) being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), for the term of life or any other indefinite period | |
> | | H | |
> | | for every RM100 and also for any fractional part of RM100 of the annuity or sum periodically payable | RM1.00 |

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(b)	for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.	The same *ad valorem* duty as a charge or mortgage for such total amount.

[9] The general principles related to the statutory declaration in most of the Commonwealth countries are as follows:

(i) it is a statement made under oath but it is not sworn.

(ii) It is used to allow a person to declare something to be true for the purposes of satisfying some legal requirement or regulation when no other evidence is available. They are thus similar to affidavits (which are made on oath).

(iii) It may be used for:

(a) Declarations of identity, nationality, marital status, etc. when documentary evidence is unavailable.

(b) Declaring the intention to change one's name.

(c) Affirming the provenance and nature of goods for export or import.

(d) Statements of originality for patent applications.

[10] Even though parties have not submitted on the law regarding statutory declaration as well as the Stamp Act, s. 57 of the Evidence Act 1950 requires the court to take cognisance of the law of the country. The judges' oath of office also requires the court to take cognisance of the law of the country to sustain rule of law. Any decision of courts saying otherwise may be *per incuriam*. (See *Reebok (M) Sdn Bhd v. CIMB Bank Berhad* [2018] 1 LNS 1186; *Kenanga Investment Bank Berhad v. Swee Joo Berhad & Ors And Another Appeal* [2017] 1 LNS 2086; *Ong Koh Hou v. DA Land Sdn Bhd & Ors* [2019] 4 CLJ 622.

[11] We take the view *inter alia* that the statutory declaration to seek repayment of a loan is in breach of general purpose for what statutory declaration are meant for. In addition, if *ad valorem* duty is not paid, the statutory declaration as admission of loan may not be worth the paper it is written on. We also find that the defendant's defence is one sustainable in law. The failure of the learned judge to give proper weight to the defence version in actual fact compromises the integrity of the decision-making process.

A **[12]** For reasons stated above, the appeal is allowed. The decision of the High Court is set aside with costs of RM10,000 for here and below subject to allocatur. Deposit is to be refunded.

We hereby ordered so.

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